SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1091.

VIRGIL OGLETREE and KATHRYN BISHOP,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

APPLICATION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI.

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Petitioners respectfully request that this Court grant rehearing of its order dated April 17, 1967, which denied certiorari, and that the Court now grant certiorari.

I.

The Petition for Certiorari previously filed herein presented the following questions:

1. Whether R. C. of Ohio, § 2915.13, which makes it a crime to "carry on" a scheme of chance, is unconstitutional for the reason that it is vague and ambiguous?

2. Whether an accused can be convicted on an indictment which fails to provide certain minimum information necessary to defense trial preparation, where the Trial Court, upon request, fails to direct the prosecution to supply the accused either a meaningful bill of particulars, or any bill of particulars?

3. Is probable cause for the issuance of a search warrant properly predicated on an affidavit which merely recites that the affiant's belief that certain gambling paraphernalia was on the premises was based on "information received from a reliable informer made observations of premises observed known persons entering premises who are known to use [sic] as persons interest [sic] in clearinghouse operation scheme of chance"?

4. Can probable cause for the issuance of a warrant be based on an affidavit which does not set forth any of the underlying circumstances from which the undisclosed informer drew his conclusions, and which also fails to set forth any of the underlying circumstances from which the officer concluded that the informant, whose identity was not disclosed, was "credible" or his information "reliable"?

5. Whether a search warrant purporting to authorize a search for and seizure of "clearinghouse slips, adding machine tape and other paraphernalia used in carrying on a clearinghouse operation number game" is a general warrant the "kind which it was the purpose of the Fourth Amendment to forbid"?

6. Whether a search warrant can be properly issued for certain described property, when neither the affidavit, nor the warrant, nor the evidence support any conclusion other than the one that the affiant, or his informant, "merely suspect, believed or concluded" that such property could be found if the described premises were searched?

7. Whether an affidavit provides a sufficient basis for the finding of probable cause to conduct a search, where the affidavit "contains no affirmative allegation that the affiant spoke with personal knowledge" and "does not even contain an affirmative allegation" that the affiant's

unidentified source 'spoke with personal knowledge' as to the presence of any of the property described as the object of the search?

8. Where the weight of the evidence supports the conclusion that police officers in executing a "search warrant" violated the Fourth Amendment by an unannounced, forcible intrusion into private premises, can the ensuing search be validated and the fruits thereof deemed admissible?

9. Does due process of law require the reversal of the Petitioners' convictions, where during their joint trial with six (6) co-defendants [a] counsel for the State adversely comments on the failure of such co-defendants to testify in their own behalf, and [b] the trial judge not only instructs the jury that such fact can be considered in arriving at a verdict, but [c] refused to instruct the jury not to draw any inferences from such failure to testify?

10. Should the convictions of these Petitioners be reversed in the interest of justice, where the appeals court reversed the convictions of their six co-defendants because of prejudicial comment on their failure to testify, by the court and prosecutor, who had forcibly argued, by implication, that the necessary inferences to be drawn from this failure to testify should affect all those jointly being tried for "carrying on" a scheme of chance?

11. Where two accused persons are jointly tried with six co-defendants on a charge of "carrying on" a scheme of chance, and the court instructs the jury that those on trial could be convicted if the jury found them to be "aiders and abettors," and the Court of Appeals reverses the conviction of the six co-defendants on constitutional grounds, since there is no way of telling from a general

verdict the theory upon which the jury arrived at its verdict, can it be held that those whose convictions were not reversed were properly convicted?

12. Whether an instruction that "carrying on" a scheme of chance within the meaning of R. C. of Ohio § 2915.13 means "doing something" in connection therewith correctly, and adequately, defines a criminal offense within the meaning of the constitution?

II.

The petition for certiorari developed the almost classic manner the Ohio Courts have continued to succeed in giving only grudging application to the standards developed by this Court for the implementation of rights guaranteed by the federal constitution.[1] Hence the possibility exists in a case such as this one, where the Court (albeit by the narrowest possible margin) has refused review, that such conviction could not possibly survive any meaningful scrutiny of its merits. This is so for a number of reasons. Not the least of which is the fact that it has never been held, nor could ever affirmatively be held that an affidavit containing the naked assertion that the affiant's belief was based on "information received from reliable informer made observations of premises observed known persons

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[1] The Ohio Supreme Court's general reluctance to follow this Court's explicit commands is of course well known. Cf. *Doughty v. Sacks,* 173 Ohio St. 407 vacated and remanded sub nom. *Doughty v. Maxwell,* 372 U. S. 781 (1963); *Doughty v. Sacks,* 175 Ohio St. 46 reversed sub nom. *Doughty v. Maxwell,* 376 U. S. 202 (1964); *State v. McLeod,* 173 Ohio St. 520, vacated and remanded, 378 U. S. 582 (1964); *State v. McLeod,* 1 Ohio St. 2d 60, reversed, 381 U. S. 356 (1965). See also *State v. Arrington,* 2 Ohio St. 2d 172 (1965); *State v. Arrington,* 3 Ohio St. 2d 61 (1965); *State v. O'Connor,* 177 Ohio St. 181, vacated and remanded, 382 U. S. 286 (1965); reversed ____ U. S. ____ (1966); *State v. Bernius,* 177 Ohio St. 155 (1964).

entering premises who are known to us as * * * persons interest[ed] in clearinghouse operation scheme of chance" qualified for the issuance of a warrant. Further, in this case even the disclosure upon inquiry that only one person known to the affiant was seen entering the premises on the occasion of this single observation (the other being an unknown female), perforce exposes the absolute lack of substance in such affidavit.

Also it is next to impossible that this Court, or any court, could expressly approve the warrant actually issued in this case with its grant of power to search for a multitude of articles including such property as one might find in a *numbers office* (property of evidentiary value only?), weapons, implements, tools and the like.

Surely if there was probable cause to believe such specifically enumerated property was on the described premises such knowledge would at least belie the factual allegation, in the warrant, to the effect that this property was in the possession of "persons unknown with intent to use the same as means of committing crime, to-wit: clearinghouse numbers game operation."

III.

In this quest for rehearing, it is urged that the comment question presented in our petition—that is, whether or not admittedly prejudicial comments on the failure to testify by six of eight co-defendants, all of whom were being represented by the same attorney, can be so prejudicial as to require a new trial—is an open question. One that is surely ripe for this Court's determination. At least there appears to be no decision by this Court as to any collateral effects of such comments, and whether or not they can so infect a trial as to require its complete vitiation.

Thus, it is most significant that the Ohio Court of Appeals, while affirming the convictions of the Petitioners, merely held that in their judgment "no error prejudicial" to them had occurred. Further, it does not appear, from the above quoted conclusory statement, what standard was used by the Appellate Court in making this judgment. Could it be that that Court felt these Petitioners had the burden of proving it prejudiced them? If that is the standard, how then is it ever to be accomplished? Compare, *Fahy v. Connecticut*, 375 U. S. 85; *Chapman v. California*, __ U. S. __. Hence, it is submitted that if nothing else the trial judge, who has not had an opportunity to pass on any possible prejudice to Petitioners that may have emanated from these comments, ought to be required, by a mandate from this Court, to do so. Because, when one considers the fact that the trial Court expressly authorized the comments (over objections), and specifically instructed the jury that they could take any failure to testify into consideration (after refusing to given the *Bruno* instruction), it could not be clearer the Court was under the impression that no one's rights were being violated either by the argument or by his charge. His view may very well have been different had he known that both the argument and the charge offended the constitutional rights of persons then on trial before him. Viewed in this light, it cannot be denied, the reversal as to Petitioners six co-defendants at least presents a situation where the trial judge, if not the Appellate Court, should make specific findings. If the trial judge, he should determine this both as a matter of fact and as a matter of law.

By this application then, Petitioners seek at the very least, and as an alternative to a full review by certiorari, a direction to the lower Courts to make a meaningful determination on this question. A comparable direction

could be made in so far as the search and seizure arguments made in the Petition. This could be accomplished by vacating the judgment and remanding the case for consideration in the light of *Aguilar v. Texas*, 378 U. S. 108, *McCray v. Illinois*, __ U. S. __, and *Warden v. Hayden*, ___ U. S. ____ (No. 480).

Even conceding the ever increasing burden on state courts, a conviction as suspect as this one is ought not become binding without any articulation by any of the Courts from whom a definition of the rights involved herein have been sought. Upon remand, if the fundamental criteria established by this Court for the implementation of constitutional rights has been observed, it is but a simple matter for the State Courts to indicate this in their ultimate determination. This, of course, in our judgment would demonstrate that rights clearly available under this Court's interpretation of the constitution have been honored, by the Courts in Ohio, by their breach.

For the above reasons, Petitioners respectfully pray that this Court grant a rehearing.

Respectfully submitted,

JAMES R. WILLIS,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

The foregoing petition is believed to be well founded in point of law and has not been filed for purposes of delay.

JAMES R. WILLIS,
Attorney for Petitioners.